JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3660

Report Summary

TO: Members of the Judicial Council

FROM: Court Technology Advisory Committee
Hon. Judith Donna Ford, Chair
Charlene Hammitt, Manager, Information Services Division, 415-865-7410, charlene.hammitt@jud.ca.gov

DATE: October 5, 2001

SUBJECT: Public Access to Electronic Trial Court Records (adopt Cal. Rules of Court, rules 2070–2077; repeal Standards of Judicial Administration, section 38) (Action Required)

Issue Statement
Code of Civil Procedure section 1010.6(b) requires the Judicial Council, by January 1, 2003, to adopt uniform rules for electronic filing and service of documents in the trial courts. The rules must include statewide policies on vendor contracts, privacy, and access to public records. New rules 2070–2077 set forth such statewide policies. The Court Technology Advisory Committee will soon finalize its proposed rules for electronic filing and service.

Recommendation
The Court Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2002:

1. Adopt rules 2070–2077 of the California Rules of Court to:

   (a) Set forth statewide policies on providing public access to trial court records maintained in electronic form, while protecting privacy and other legitimate interests in limiting disclosure of certain records; and

   (b) Set forth statewide policies regarding courts' contracts with vendors to provide public access to court records maintained in electronic form.

2. Repeal section 38 of the Standards of Judicial Administration.

The text of the proposed rules is attached at pages 26–33, and the text of the standard to be repealed is attached at pages 34–36.

Rationale for Recommendation

The Legislature's charge to the council is to adopt uniform rules for the electronic filing and service of documents in the trial courts, including statewide policies on vendor contracts, privacy, and access to public records. The policies in the new rules are of particular statewide concern because many courts are implementing electronic filing but are uncertain what their obligations are with respect to providing public access to these filings through the Internet. The committee believes that even in the absence of the Legislature's charge to adopt statewide policies it is advisable for the council to do so, to ensure uniform access practices among the 58 counties.

The policy reasons considered by the committee and which support the committee's specific recommendations are presented in the Rationale for Recommendation in the Report.

Descriptions of the proposed rules follow.

Rule 2070 defines "trial court records," "trial court records maintained in electronic form," and "the public" as used in the new rules.

Rule 2071 states that the new rules do not limit access by parties or their attorneys, or access by others who are afforded a greater right of access by statute or California Rules of Court than that provided to the general public. Rule 2071 also states that the new rules do not limit remote electronic access to a court's register of actions or its calendars.

Rule 2072 states that the new rules are intended to provide the public with reasonable access to trial court records maintained in electronic form, while protecting privacy interests. Rule 2072 also states that the new rules are not intended to provide public access to court records to which the public does not otherwise have a right of access.

Rule 2073 states that (1) the public has a general right of access to trial court records maintained in electronic form except as otherwise provided by law; (2) courts must grant access only on a case-by-case basis; and (3) when records become inaccessible by court order or operation of law, courts are not required to take action with respect to copies of those records that were made by the public before the records became inaccessible.

Rule 2074 states that (1) electronic access to trial court records maintained in electronic form must be reasonably available to the public through industry-standard software and at terminals at the courthouse; (2) courts may provide electronic access to records in the following proceedings only through public terminals at the courthouse, and must not provide remote electronic access to records in them: (a) proceedings under the Family Code, (b) juvenile court proceedings, (c) guardianship and conservatorship proceedings, (d) mental health proceedings, (e) criminal proceedings, and (f) civil harassment proceedings under Code of Civil Procedure section 527.6; (3) courts are not required to provide electronic access to their trial court records if this access is not feasible because of resource limitations; (4) persons accessing court records electronically must consent to access the records only as instructed by the court and must consent to the court's monitoring of access to its records; (5) courts must notify the public about the following information: (a) whom to contact about requirements for accessing their records electronically, (b) copyright and other proprietary rights that may apply to information in their records, and (c) that a record available by electronic access does not constitute the official record of the court unless it has been electronically certified by the court; and (6) courts must post a privacy policy on their Web sites to inform users of the information they collect regarding access transactions and the uses they may make of the collected information.

Rule 2075 states that courts must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243.1.

Rule 2076 states that a court's contract with a vendor to provide public access to its records maintained in electronic form must be consistent with the new rules, must require the vendor to provide access and to protect confidentiality as required by law, and must specify that the court is the owner of the records and has the exclusive right to control their use.

Rule 2077 states that courts may impose fees for providing public access to their records maintained in electronic form, as provided by Government Code section 68150(h), and that courts that provide exclusive access to their records through a vendor must ensure that any fees the vendor imposes for providing access are reasonable.

Alternative Actions Considered

No alternative actions were considered because the Judicial Council is required by statute (Code Civ. Proc., § 1010.6(b)) to adopt rules of court governing vendor contracts, privacy, and access to public records filed electronically with the trial courts. A chronology of actions the committee has taken since it first began to consider developing statewide standards for providing public access to electronic court records is set forth in the Rationale for Recommendation in the Report.

Comments From Interested Parties

The proposed rules were circulated for comment during the spring 2001 cycle. A total of 24 comments were received. The commentators included judges, court administrators, and representatives from the media. Representatives from the court and legal communities generally supported the rules; representatives from the news media did not. Some representatives from the media took the position that remote electronic access to court records should be limited only on a case-by-case basis, e.g., on a party's motion to seal; others took the position that remote electronic access should be afforded in all cases.

Some commentators proposed specific modifications, many of which the committee adopted. The modifications that were adopted are presented under Comments From Interested Parties in the report that follows this summary. However, the committee's conclusion that remote access should not be allowed in the cases specified was not changed in response to the comments received, for the reasons set forth in the Rationale for Recommendation in the report that follows this summary.

A chart summarizing the comments and the committee's responses is attached at pages 37–56.

Implementation Requirements and Costs

As courts begin to implement electronic filing, they must consider how they will provide public access to these records. Some courts already have public terminals in place; others will need to install them at the courthouse. Providing the public with electronic access to court records should result in a cost savings for courts, since this means of access does not require that a court clerk spend time making the records available for inspection and copying by the public, as is required with paper records. As provided in rule 2077, courts may impose a fee for providing electronic access to their records; however, it is anticipated that many, if not most, courts will not do so.

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Issue Statement
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Unlike many other states, California does not provide for a right of public access to court records by statute or rule of court, whether the records are in paper or electronic form. Instead, public access to court records is afforded under the common law. (See *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 373 [74 Cal.Rptr.2d 69].) Court records are presumptively accessible to the public unless made inaccessible by statute, California Rules of Court, or court order. Currently, section 38 of the Standards of Judicial Administration (proposed by the committee and adopted by the council effective January 1, 1999) sets forth guidelines courts should follow in providing public access to electronic records.[1] Government Code section 68150(h) provides that court records preserved or reproduced in electronic form must "be made reasonably accessible to all members of the public for viewing and duplication as would the paper records."

[1] Because the proposed rules will preempt section 38, the committee recommends that section 38 be repealed.

Under the mandate of Code of Civil Procedure section 1010.6(b), the Court Technology Advisory Committee developed a set of proposed rules on public access to electronic trial court records. The rules were circulated for public comment and, after incorporating a number of suggestions made in the comments, the committee has finalized a set of rules for submission to the council.

Proposed Rules

Rule 2070 defines "trial court records," "trial court records maintained in electronic form," and "the public" as used in rules 2070–2077.

Rule 2071 states that rules 2070–2077 do not limit access by parties or their attorneys, or access by others who are afforded a greater right of access by statute or California Rules of Court than that provided to the general public. Rule 2071 also states that the new rules do not limit remote electronic access to a court's register of actions or its calendars.

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Rule 2073 states that (1) the public has a general right of access to trial court records maintained in electronic form except as otherwise provided by law; (2) courts must grant access only on a case-by-case basis; and (3) when records become inaccessible by court order or operation of law, courts are not required to take action with respect to copies of those records that were made by the public before the records became inaccessible.

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accessing their records electronically, (b) copyright and other proprietary rights that may apply to information in their records, and (c) that a record available by electronic access does not constitute the official record of the court unless it has been electronically certified by the court; and (6) courts must post a privacy policy on their Web sites to inform users of the information they collect regarding access transactions and the uses they may make of the collected information.

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Rule 2077 states that courts may impose fees for providing public access to their records maintained in electronic form, as provided by Government Code section 68150(h), and that courts that provide exclusive access to their records through a vendor must ensure that any fees the vendor imposes for providing access are reasonable.

Rationale for Recommendation

Balancing the right of access against the right of privacy

Rules 2070–2077 attempt to balance the right of public access to trial court records against the right of privacy afforded by article I, section 1 of the California Constitution. The rules recognize the fundamental difference between paper records that may be examined and copied only at the courthouse and electronic records that may be accessed and copied remotely. It is the conclusion of the Court Technology Advisory Committee that unrestricted Internet access to case files would compromise privacy and, in some cases, could increase the risk of personal harm to litigants and others whose private information appears in case files.

In recognition of these concerns, the rules set forth a three-part approach to public access:

- First, the rules provide for a general right of access to trial court records maintained in electronic form (rule 2073(a)).

- Second, the rules preclude *remote* electronic access by the public to filings in family law, juvenile, mental health, guardianship and conservatorship, criminal, and civil harassment proceedings because of the personal and sensitive nature of the information parties are required to provide to the

court in these proceedings. Public access to electronic records in these proceedings is available only at public terminals at the courthouse (rule 2074(b)).

- Third, the rules provide that a court must not provide electronic access to any court record that has been sealed (rule 2075).

Committee's conclusions
The rules are based on the conclusion of the Court Technology Advisory Committee that electronic records differ from paper records in three important respects: (1) ease of access, (2) ease of compilation, and (3) ease of wholesale duplication. Before the advent of electronic court records, the right to inspect and copy court records depended on physical presence at the courthouse. Unless a case achieved notoriety, sensitive information in the case file was unlikely to circulate beyond those directly concerned with the case. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding.

The rules are also based on the committee's conclusion that the judiciary has a custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of electronic case files. Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in limiting disclosure. While there is no question that court proceedings should not ordinarily be conducted in secret, the public's right to information of record is not absolute. When the public's right of access conflicts with the right of privacy, the justification for the requested disclosure must be balanced against the risk of harm posed by the disclosure. (*Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 166 [32 Cal.Rptr.2d 382].)

Rule drafting history
The committee has been working on the issues covered by rules 2070-2077 for the past six years.

In 1995, the committee established a Privacy and Access Subcommittee to develop statewide policies for public, commercial, and media access to court information in electronic form. Membership encompassed a range of interests, including not only members of the committee, but a representative of the Justice Department, a member of the California Assembly, the director of the Privacy Rights Clearinghouse (a privacy advocate for consumer interests), the director of the First Amendment Coalition (an organization that represents primarily media interests), and the government affairs liaison officer of the Information Industry Association

(a trade association of direct marketers, credit reporting businesses, and the like). Public hearings were held in Southern and Northern California, inviting comment on assuring access, protecting privacy, and funding.

In 1996, the privacy and access subcommittee drafted a rule that took a conservative approach to electronic access. To preclude the possibility of the dissemination and propagation of personal information that by law is available only for limited times or in partial and uncompiled form, the subcommittee recommended that remote electronic access to civil and criminal case data be restricted to specified index information and that the balance of case data, through available at the courthouse, not be provided by remote access. The full committee recommended revising the rule to require broad access. The redrafted rule provided that "any record that a judicial branch agency makes available to the public shall be made available electronically, to the extent that the agency has determined that it has sufficient resources to do so." This rule essentially would have provided access to electronic records on the same terms as paper records. The committee circulated the rule for comment to various advisory committees and AOC staff in Appellate and Trial Court Services.

In 1997, the rule was circulated for public comment. Negative comments outnumbered positive comments by approximately 30 percent. The proposal was criticized for failing to account for differences between paper and electronic records. Many comments expressed concerns about privacy interests in court records (particularly in family law cases), legal restrictions on the dissemination of certain data in criminal case files, and problems with implementation. The committee established a working group to address the issues raised in the comments and to revise the proposal.

In 1998, the committee revised the rule (proposed rule 897) to apply only to trial court pilot projects for certain types of civil cases. The rule was circulated for comment and was criticized for failing to clarify the relationship between existing and new pilot projects. The committee then recast the rule as Section 38 of the Standards of Judicial Administration. The committee's intent in changing the rule to a standard was to encourage innovative projects, to eliminate the contradiction between mandatory rules and permissive standards authorizing pilot projects, and to present recommendations that would not contradict statutory or case law. Section 38 was adopted by the Judicial Council and became effective January 1, 1999. This section was intended to provide trial courts with guidance on providing public access to electronic records until statewide rules of court could be adopted.

In 1999, section 1010.6 was added to the Code of Civil Procedure with the support of the Judicial Council, which believed that it was time to develop statewide standardized statutes and rules to safeguard the security of electronic documents,

the integrity of court electronic filing systems, and the rights of the parties, while facilitating electronic filing in the trial courts. Section 1010.6(b) requires the Judicial Council to adopt uniform electronic filing rules that include statewide policies on vendor contracts, privacy, and access to public records.

The committee and its Strategy Subcommittee worked throughout the past year on developing draft rules on vendor contracts, privacy, and access to public records. At the end of the year, the committee circulated the draft to the presiding judges and court executives for their comment. The committee revised the draft after this informal circulation and voted in January 2001 to submit the rules to the Rules and Projects Committee. The rules were circulated for public comment in the spring, and were revised by the committee in light of the public comments received. With minor adjustments, these are the rules the committee recommends for adoption effective January 1, 2002.

Court decisions

The rules are based in part on the U.S. Supreme Court's 1989 decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (109 S.Ct. 1468, 103 L.Ed.2d 774), in which the court referred to the relative difficulty of gathering paper files as "practical obscurity." In this case, which involved a request under the Freedom of Information Act for the release of information from a database summarizing criminal history, the court recognized a privacy interest in information that is publicly available through other means but is "practically obscure." The court noted that "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by the disclosure of that information." (*Id.* at p. 764.) It specifically commented on "the vast difference between public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information." *(Ibid.)* In weighing the public interest in releasing personal information against the privacy interest of individuals, the court defined the public's interest as "shedding light on the conduct of any Government agency or official," rather than acquiring information about particular private citizens. (*Id.* at p. 773.) The court also noted that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." (*Id.* at p. 770.)

In an earlier decision (*Whalen v. Roe* (1977) 429 U.S. 589 [97 S.Ct. 869, 51 L.Ed.2d 74]), the U.S. Supreme Court considered the issue of informational privacy with respect to a constitutional challenge to a State of New York computer system for the reporting of the names and addresses of persons who obtained certain prescription drugs. The court did not find a constitutional violation, because the statute in question contained sufficient protections against unauthorized use and disclosure of the reporting system. It did, however, express

concern over the "vast amounts of personal information in computerized data banks or other massive government files." (*Id.* at p. 599.)

Although neither of these decisions involved the issue of public access to court records, they are cited because they shed light on the court's concerns about the dissemination of presumptively public records in an electronic environment, and suggest that the U.S. Supreme Court believes there is a fundamental difference between records maintained in paper form and records maintained in electronic form that may be accessed and copied remotely.

More recently, the U.S. Supreme Court has affirmed privacy rights in two cases involving access to government-held records:

1. In *Reno v. Condon* (2000) 528 U.S. 141 [120 S.Ct. 666, 145 L.Ed.2d 587], the court unanimously upheld the Driver's Privacy Protection Act, which prohibits the disclosure and resale of drivers' and automobile owners' personal information without their consent.

2. In *Los Angeles Police Dep't v. United Reporting Pub. Corp.* (1999) 528 U.S. 32 [120 S.Ct. 483, 145 L.Ed.2d 451], the court held that Government Code section 6254(f)(3), which requires a person requesting an arrestee's address to declare that the request is made for one of five prescribed purposes, does not violate the First Amendment but merely regulates access to information in the government's possession, and that states may decide not to give out arrestee information at all without violating the First Amendment.

Other court decisions have also recognized the need to protect individual privacy because of the increasing computerization of public and private records. See, for example, *White v. Davis* (1975) 13 Cal.3d 757, 774–75 (120 Cal.Rptr. 94) (noting that the major impetus for adding privacy as one of the "inalienable rights" guaranteed under Cal. Const., art. I, § 1, was concern about computerization of public and private records); *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 265 (198 Cal.Rptr. 489) (in this case, which involved the issue of public access to juror questionnaires, the court noted that, "[i]n this informational age, commercial misuse of this stored data has potential for unintended harm to which the judiciary may not wish to contribute. . . . Importantly, the court does not have the power to contain the extent to which the data may be used to yield information about a juror's life").

Legislation

The rules are also based on the committee's concern that if courts do not recognize a distinction between electronic and paper records, the courts' electronic records may be used to circumvent public policy protections that the Legislature has

extended to records held by other agencies and entities, e.g., under various provisions of the Public Records Act (Gov. Code, § 6250 et seq.) and the California Information Practices Act (Civ. Code, § 1798 et seq.) that apply to state agencies but not to the courts. Many bills addressing privacy issues, including identity theft and confidentiality of records, have been proposed in Congress and the California Legislature. A particular area of concern is the protection of personal identifying information. This type of information—e.g., social security numbers and financial account numbers—is frequently contained in court files.

Actions taken by the federal courts

The committee is not alone in being concerned about providing information from case files on the Internet. The Committee on Court Administration and Case Management of the Judicial Conference of the United States recently drafted a report and recommendations for providing public access to federal case files while also protecting privacy and other interests in limiting disclosure. The Judicial Conference approved the report and recommendations on September 19, 2001. The recommendations are as follows:

- Public access to civil case files: documents in civil case files should be made available electronically to the same extent that they are available at the courthouse, except for Social Security cases because they contain extremely detailed medical records and other personal information. Personal data identifiers, for example, Social Security numbers, birth dates, financial account numbers, and names of minor children should be modified or partially redacted by the litigants. Only the last four digits of a Social Security number or financial account number should be recited in a document. If the involvement of a minor child must be mentioned, only the child's initials should be recited. If a birth date is necessary, only the year should be recited.

- Public access to criminal case files: public remote access to documents in criminal cases should not be available at this time. This policy will be reexamined within two years. The committee determined that any benefits of remote electronic access to criminal case files were outweighed by the safety and law enforcement risks this access would create.

- Public access to bankruptcy case files: documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases. The Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document.

- Public access to appellate case files: documents in appellate cases should be treated in the same manner in which they are treated in the trial court, an acknowledgment of the importance of uniform practice in the courts.

The Report notes that:

- To a great extent, the recommendations rely on counsel to protect the interests of their clients and may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet. The proposed system requires counsel and pro per litigants to carefully review whether it is essential to their case to file certain documents containing private sensitive information and to seek sealing orders or protective orders, as necessary.

- Federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and the recommendations do not create any entitlement to such access.

- Remote electronic access will be available only through the PACERNet system, which requires registration with the PACER (Public Access to Court Electronic Records) service center and the use of a log-in and password. Such registration "creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises."

The Administrative Office of the United States Courts staff paper, *Privacy and Access to Electronic Case Files in the Federal Courts*, lists the following factors that may justify electronic access restrictions (at pp. 30–32):

- Balancing access and privacy interests in public information would be consistent with recent actions by the executive branch, e.g., the President's directive to federal agencies to review their privacy policies.

- Congress is likely to recognize the judiciary's responsibility to act in this area; for example, various bills have been introduced to implement safeguards for privacy interests in bankruptcy court records.

- Access rights, whether based on the common law or on the Constitution, are not absolute.

- The loss of "practical obscurity" suggests a need to evaluate access policy. Traditional methods of protecting privacy interests, inherited from the days

of paper case files, may offer inadequate protections in the coming era of electronic case files. Although judges currently balance privacy and access interests primarily through the consideration of motions to seal records on a case-by-case basis, the implementation of electronic case files may justify rethinking the generally passive role played by courts and judges in this area.

- The judiciary has a special custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. The courts are custodians of personal and sensitive documents by virtue of the fact that litigants and third parties are compelled by law to disclose certain information to the courts for adjudicatory purposes. Although there is no "expectation of privacy" in case file information, there is certainly an "expectation of practical obscurity" that will be eroded when case file information is available on the Internet for all to see. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.

- "Access" need not mean the easiest and broadest public access. Although courts have a duty to provide access, at this point there is no statutory obligation to disseminate case files electronically. Case law on access to documents that are not relevant to the performance of the judicial function may provide insights to developing a policy that appropriately limits access to certain electronic case files or to documents in them.

- New forms of access may unduly raise the privacy "price" that litigants must pay for using the courts. The prospect of unlimited disclosure of personal information in case files may undermine public confidence in the litigation process and in the courts.

- Unlimited electronic disclosure of case files may not promote the underlying goals of providing access to case files; that is, effective monitoring of the courts by the public may be accomplished without unlimited disclosure of all the documents in case files. This consideration is especially pertinent to documents in a file that are only marginally related to the adjudication process.

Much of the controversy over the federal courts' electronic public access system ("PACER") has centered on the availability of the detailed financial information that a debtor is required to provide in a bankruptcy proceeding. This has involved the issue of the debtor's right to maintain some privacy versus the creditors' right to have information about the debtor's finances readily available. In January of

this year, the U.S. Justice Department, Treasury Department, and Office of Management and Budget issued a *Study of Financial Privacy and Bankruptcy*, which found substantial privacy concerns in public bankruptcy filings. This report notes that "[t]he emergence of new technologies has an impact on both general public access to information in bankruptcy and the debtor's interest in the privacy of such information. Increased use of the Internet and other powerful databases—both in the judicial system and among the general public—is lowering the barriers to access for parties that have an interest in that information. Personal, often sensitive, information now may be accessed and manipulated from a distance and used in ways not envisioned when the rules that currently govern these records were created. This, in turn, heightens the interests of debtors in ensuring that this information is protected from misuse by private entities." (*Id.* at p. ii.) The report also notes that "[m]uch of the data available to the general public from a bankruptcy proceeding generally is not available from other sources" and that the "comprehensive nature of the information required in bankruptcy proceedings, and the fact that such information is often restricted in other contexts, suggests that there may be reasons to reconsider the current system, which allows unrestricted access to such data by the general public." (*Id.* at p. 19.) It makes the following recommendations:

- Protection of personal financial information should be given increased emphasis in the bankruptcy system, and bankruptcy information policy should better balance society's interest in government accountability and the debtor's privacy. Debtors should not be required to forgo reasonable personal privacy expectations and expose themselves unnecessarily to risk in order to obtain the protections of bankruptcy. (*Id.* at pp. 28–29.)

- The general public should continue to have access to general information so that the public can hold the bankruptcy system accountable, e.g., the fact that an individual has filed for bankruptcy, the type of proceeding, the identities of the parties in interest, and other core information; but the public should not have access to highly sensitive information that poses substantial privacy risks to the debtor, e.g., social security numbers, financial account numbers, detailed profiles of personal spending habits, and debtor's medical information. Special attention should be given to protecting information about individuals or entities that are not parties to the bankruptcy proceeding. (*Id.* at p. 30.)

- The bankruptcy system should incorporate fair information principles of notice, consent, access, security, and accountability. Debtors should be informed in writing that certain information they disclose in their petitions and schedules may be disclosed to the general public. Debtors' consent

should be required before this information may be disclosed for purposes unrelated to the bankruptcy case. (*Id.* at pp. 34–35.)

- Mechanisms should be developed to ensure that private entities that improperly use a debtor's personal financial information are held accountable. (*Id.* at p. 37.)

Actions taken by other state courts

For many years, rule 123 of the Arizona Rules of the Supreme Court has governed public access to the judicial records of all courts in Arizona, whether in paper or electronic form . In August 2000, the Chief Justice of the Arizona Supreme Court appointed an Ad Hoc Committee to Study Public Access to Electronic Court Records, to examine the issues surrounding public access to computerized court records and to develop recommendations to modify rule 123 with respect to disclosure of these records. The committee issued its report in March 2001, making the following recommendations:

- Courts should protect from remote electronic public disclosure social security numbers, financial account numbers, credit card numbers, and debit card numbers, and courts should review their forms and processes to ensure that this type of information is not being gathered unnecessarily.

- The Supreme Court should develop a form for sensitive data. Information in the form would be available for public inspection at the courthouse but not on the Internet.

- The Supreme Court should notify judges, attorneys, and the public that case records are publicly accessible and may be available on the Internet.

- Domestic relations, juvenile, mental health, and probate records should not be accessible to the public on the Internet.

- Remote access should be afforded on a case-by-case basis, and bulk data should not be electronically accessible on the Internet.

Other state courts limit their publicly accessible electronic court records to either (1) docket information (e.g., Massachusetts) or (2) docket information, a description of the type of case, and the judgment (e.g., Missouri).

In February 2001, the Virginia Legislature appointed a joint subcommittee to study the protection of information contained in the records, documents, and cases filed in the courts of Virginia.

Comments From Interested Parties

The proposed rules were circulated for comment during the spring 2001 cycle. A total of 24 comments were received.

Comments were submitted by (1) representatives from many California courts, including Alameda, Amador, Butte, Los Angeles, Orange, Riverside, San Diego, San Mateo, Santa Clara, Siskiyou, and Stanislaus Counties; (2) the California Judges Association; (3) the California Court Reporters Association; (4) the Office of the Attorney General; (5) the California Newspaper Publishers Association et al.; (6) the Reporters Committee for Freedom of the Press; (7) the Privacy Rights Clearinghouse; (8) Access Reports; (9) the California Appellate Project; (10) the Hemet/Mt. San Jacinto Bar Association; and (11) Consumer Attorneys of California.

Many of the commentators supported the rules as proposed. Some commentators suggested modifications to the rules and some opposed the rules, particularly the limitations on remote electronic access.

A chart summarizing the comments and the committee's responses is attached at pages 37–60.

Descriptions of the comments and the committee's responses follow.

Comments on the definition of "trial court records" in rule 2070(a), and the committee's responses

One of the commentators, John Avery, President of the California Court Reporters Association (comment 2), asked that the rules make clear that they do not apply to reporters' transcripts. In response to this comment, the committee amended the rule to specifically exclude from the definition reporters' transcripts for which fees are required.

Another commentator, Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8), proposed that the definition of "trial court records" include the definition of court records set forth in *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113–15. One other commentator, Timothy Gee, Management Analyst at the Superior Court of San Mateo County (comment 10), proposed that the definition clarify whether court minutes are trial court records. The committee took no action on these proposals, concluding that the definition covers the court records set forth in *Copley* and also covers court minutes. These matters are noted in the advisory committee comment appended to this rule.

Comment on access to court's register of actions in rule 2071(b), and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (Comment 8) was concerned that, because this rule excludes the register of actions and court calendars from the application of the rules, the public would *not* have a right of access to these records in electronic form.

This was *not* the intent of the committee. As a result, the committee amended this rule to specifically provide that the rules do not limit remote electronic access to a court's register of actions or its calendars.

Comment on constitutional right of access versus constitutional right of privacy in rule 2072, and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) was "concerned that the description of the purposes of the proposed rules emphasizes the constitutional status of the right to privacy while failing to recognize that the right of public access is also of constitutional stature."

The committee concluded that the reference in the rule to the constitutional right of privacy (under Cal. Const., art. I, § 1) should be deleted to avoid any implication that the rules favor privacy at the expense of access; instead the rules attempt to balance the two interests.

Comment on the general right of access in rule 2073(a), and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) was concerned that the reference limiting public access as required by "rule" might permit the adoption of local rules restricting public access to court records to which the public has a right of access.

The committee never intended for courts, by local rule, to be able to limit access to categories of records not restricted by the California Rules of Court (or by statute or court order). Therefore, the committee changed the reference from "rule" to "California Rules of Court" so that the rule now reads: "All trial court records maintained in electronic form must be made available to the public, except as otherwise provided by law, including, but not limited to, statutes, California Rules of Court, and court orders."

Comments on access only on a case-by-case basis in rule 2073(b), and the committee's responses
This was an area of great concern to a number of commentators, particularly with respect to the issue of complying with bulk requests and data compilations. David

De Alba, Special Assistant Attorney General, Office of the Attorney General (comment 7), noted the importance of safeguarding against the bulk and/or commercial distribution of sensitive personal information. Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) proposed doing away with this subdivision altogether because it imposes restrictions on access to electronic court records that are not currently imposed on access to paper court records—that is, members of the press can currently gather information about cases filed in paper form without knowing the parties' names, case number, and so on, and this rule would prohibit them from obtaining information about proceedings of which they are not already aware. Harry Hammitt, Editor at Access Reports (comment 14), completely disagreed with this rule, stating that to require a member of the public to identify a file with the specificity suggested is to limit access to it, in practical terms, to those who are already familiar with the case. J. Rumble of the Superior Court of Santa Clara County (comment 21) stated that courts should not be required to provide compilations or responses to requests for electronic data not directly linked to the official records. He added that the approach stated in the discussion accompanying the rule—i.e., that it is left to individual courts to decide whether to comply with bulk requests—is inconsistent with the legislative mandate of Code of Civil Procedure section 1010.6(b), which requires the council to develop statewide policies on access, and that the issue is of such significance that it warrants a statewide policy.

The committee's legal justification for limiting access on a case-by-case basis has been that courts clearly have authority to place reasonable time, place, and manner restrictions on public access so as not to interfere with the business of the court. Access rules of other state and federal courts (see, e.g., Arizona Supreme Court rule 123(f)(1), (g)(2) and PACER) require a case name and/or number for access. The rule does not limit the number of searches that may be conducted and does not prohibit anyone from, for example, searching for all new cases filed in the court each day by checking the court's register of actions.

The committee was quite concerned by the problem Mr. Rumble faced in his court—how to respond to a media request for the court's entire database, which includes confidential information to which the public does not have a right of access. In order to comply with such a request, it would be necessary for court personnel to carefully review each record in the database and redact all confidential information from the records—a costly, time-consuming, and perhaps impossible task. The committee is aware that other courts have been confronted with similar requests, and concluded that a statewide policy is needed to address this issue. Therefore, in response, the committee deleted from the comment to the rule the sentence that indicated that it is left to individual courts to decide whether

to comply with bulk requests. Under the rule, courts must comply with requests for records on a case-by-case basis only.

Comments on denying remote electronic access to records in specified proceedings, as provided in rule 2074(b), and the committee's responses
David De Alba, Special Assistant Attorney General (comment 7), suggested adding the following to the list of records that are not available remotely: (1) records in civil harassment proceedings under Code of Civil Procedure section 527.6; (2) records in personal injury and medical malpractice cases, which generally include personal medical information and which the Legislature has recognized require special privacy protection under Government Code section 6254(c); and (3) records filed under seal under Government Code section 12652(c).

The committee agreed that records in civil harassment proceedings under Code of Civil Procedure section 527.6 should be added to the list of records that are not available by remote electronic access but only by public terminals at the courthouse, and has done so by adding a subdivision (b)(6) to rule 2074. Allegations in these proceedings are analogous to those in domestic violence and dissolution stay-away orders to which subdivision (b)(1) limits access.

Government Code section 6254(c), which Mr. De Alba references, is contained in the Public Records Act, which does not apply to the courts and exempts disclosure of personnel, medical, or similar files when such disclosure would constitute an unwarranted invasion of personal privacy. Records containing personal medical information (whether in personal injury and medical malpractice cases or in other types of cases) may be sealed on a case-by-case basis under rule 2075. Therefore, the committee declined to add these records to rule 2074(b).

Government Code section 12652(c), which Mr. De Alba also references, provides that complaints filed under the False Claims Act (Gov. Code, §§ 12650–12655) must be filed under seal and may remain under seal for up to 60 days. The committee also declined to add this record to rule 2074(b).

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) states that there is no substantial justification for distinguishing between the information available through electronic access at the courthouse and that available through remote electronic access, and that limitations on remote electronic access should be eliminated in favor of a requirement that records that are subject to statutory requirements of confidentiality or that have been ordered sealed not be subject to electronic access of any kind. This comment also proposes that parties be obligated to include an identifying statement on the cover of any document or exhibit that is subject to a

confidentiality requirement, and that the court is not responsible for public disclosure of a document so identified. Finally, it proposes that restrictions on remote electronic access to all criminal case records should be eliminated and replaced with a provision restricting electronic access only in regard to documents or exhibits sealed under statute or court rule.

As noted under Rationale for Recommendation, the reason the committee singled out the six enumerated proceedings for special treatment is because of the sensitive nature of the information that parties are required to provide in them. Government Code section 68150(h) requires that court records preserved or reproduced in electronic form "be made reasonably accessible to all members of the public for viewing and duplication as would the paper records." The committee believes that this rule is a reasonable interpretation of the statute. It also reflects the fact that the Legislature has recognized that many of the records in these proceedings should be closed to the public. The approach the committee has taken in this subdivision is in accord with the approach being taken (or being considered) by both the federal courts and many other state courts, as noted under Rationale for Recommendation. For the policy reasons discussed at length there, the committee declined to eliminate the restrictions on remote electronic access.

Ashley Gauthier, Legal Fellow at the Reporters Committee for Freedom of the Press (comment 9), concurred with the comments made by Gray Cary Ware & Freidenrich. She also proposed that the rule not impose limitations on remote electronic access, on the basis that "any information that is contained in a court record is not subject to a privacy interest."

The committee disagrees with this position. A right of privacy is specifically afforded under article I, section 1 of the California Constitution. Additionally, the federal courts have found an informational right of privacy in court records under the U.S. Constitution, which is an "individual interest in avoiding disclosure of personal matters." (*In re Crawford* (9th Cir. 1999) 194 F.3d 954, 958, following *Whalen v. Roe* (1977) 429 U.S. 589, 599 [97 S.Ct. 869, 51 L.Ed.2d 64].) For example, indiscriminate public disclosure of social security numbers that are contained in court filings, particularly when accompanied by names and addresses, "may implicate the constitutional right to informational privacy." (*Id.* at p. 958.)

José Octavio Guillén, Executive Officer/Clerk at the Superior Court of Riverside County (comment 13), indicated in his comments that his court strongly disagrees with the courthouse-versus-remote distinction in rule 2074(b) because (1) it requires courts to "chase technology" and continually update access rules as new technology becomes available that allows court records to be electronically collected at the courthouse; (2) it poses access-to-justice issues because of the

limited hours a courthouse is open; and (3) it requires courts to make computer system modifications that would be unnecessary if there were no distinction.

It certainly is not the committee's intention to make the work of the courts more difficult, but, as discussed under Rationale for Recommendation in this report, it is the position of the committee that there are important policy reasons for limiting remote access to the records specified. As noted in rule 2072, the committee recognizes the important public service that courts perform in providing remote electronic access in all other cases to which access is not otherwise restricted by law.

Loree Johnson, Information Systems Manager at the Superior Court of Siskiyou County (comment 17), stated in her comments that information that is available to the public at the courthouse should also be available remotely if the court wishes it to be. She notes that Siskiyou is a very rural county, and it is a hardship for people in remote areas to travel many miles to the courthouse to view information that could be made available on the Internet.

The rules *do* provide for remote electronic access to most types of court records, and rule 2072 specifically acknowledges the benefits to the public that should result from providing this access. However, courts may not decide, by local rule or policy, to provide remote access to the records specified in rule 2074(b). The purpose of the rules is to provide a statewide policy regarding public access and privacy that applies to all trial courts. There is also nothing in the rules that would prevent a court from sending a record by mail, fax, or e-mail to a person who cannot come to the courthouse.

Comments on denying electronic access based on resource limitations, as provided in rule 2074(d), and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8), suggested that the rule clarify that if records are available only in electronic form, the court must ensure that the public's right of access is accommodated. Harry Hammit, Editor at Access Reports (comment 14), proposes that courts be encouraged, and be provided with funds, to move aggressively toward providing access.

The committee amended the rule to provide that courts may limit electronic access as long as some type of access is provided.

Comments on conditions of use in rule 2074(e), and the committee's response
Beth Givens, Director of Privacy Rights Clearinghouse (comment 11), and Linda Robertson, Supervising Attorney at the California Appellate Project (comment 20), both expressed concern about the language in this rule, which sets forth as one

of the conditions of access that the user consent to "monitoring" by the court of access to its records. They proposed that the rule specify the information that will be collected, and who will have access to it and under what circumstances.

The committee believes that this matter is adequately addressed by a change it made to rule 2074(g), which now provides as follows: "A court must post on its public-access Web site a privacy policy to inform members of the public accessing its records maintained in electronic form of the information it collects regarding access transactions and the uses that the court may make of the collected information."

Comments on rule 2075's limitation on public access based on overriding interest, and the committee's responses
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) proposed that this rule refer to rule 243.2 as well as rule 243.1 of the California Rules of Court with respect to requirements for a court's sealing order.

The committee deleted the reference to the requirements for a court's sealing order and amended the rule to provide: "A court must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243.1."

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. also proposed that this rule provide that courts may adopt procedures for the separate filing, redaction, or other method of identifying and excluding certain types of information from remote electronic access, including social security numbers, financial account numbers, names of confidential informants in criminal proceedings, information about victims of sexual abuse crimes, and information about persons seeking temporary restraining orders in domestic violence, sexual abuse, or stalking cases.

In the advisory committee comment appended to the rule, the committee suggests the types of information that parties may request the court to seal, such as medical or employment records, tax returns, financial account numbers, credit reports, and social security numbers. In drafting the rules, the committee considered restricting remote access to specific data elements in a court record, such as a party's financial account numbers, but concluded that the problem with this approach is one of practical implementation: it would require someone in the clerk's office to carefully read each document filed with the court to ascertain whether there are any matters in the document that need to be redacted, and might subject the courts to liability for failing to redact all confidential data elements. Therefore, the committee concluded that the more workable approach is to limit remote

electronic access to certain categories of cases (as is done in rule 2074(b)) and not to items of information that must be provided in specified records.

Comment on contracts with vendors in rule 2076, and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) proposed that this rule require that a vendor provide public access to a court's records in a manner consistent with the requirements of law.

The committee amended the rule in response to this comment so that it now reads as follows: "A trial court's contract with a vendor to provide public access to its trial court records maintained in electronic form must be consistent with these rules, and must require the vendor to provide public access to these records and to protect the confidentiality of these records as required by law . . . ."

Comment on fees for electronic access in rule 2077, and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) proposed that this rule should make clear that vendors may not charge fees in excess of those associated with the costs of duplication, as provided by Government Code section 68150(h).

The committee revised this rule in response to this comment by adding the following sentence to the rule: "To the extent that public access to a court's records maintained in electronic form is provided exclusively through a vendor, the court must ensure that any fees the vendor imposes for the costs of providing access are reasonable."

Recommendation
The Court Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2002:

1. Adopt rules 2070–2077 of the California Rules of Court to:

   (a) Set forth statewide policies on providing public access to trial court records maintained in electronic form, while protecting privacy and other legitimate interests in limiting disclosure of certain records; and

   (b) Set forth statewide policies regarding courts' contracts with vendors to provide public access to court records maintained in electronic form.

2. Repeal section 38 of the Standards of Judicial Administration.

The text of the proposed rules is attached at pages 26–33, and the text of the standard to be repealed is attached at pages 34–36.

Attachments